COURT OF APPEALS
DECISION
DATED AND FILED

June 16, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP207 **Cir. Ct. No. 11CV18551**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

SCOTT SMITH,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

ALPHA CARGO TECHNOLOGY, LLC,

PLAINTIFF,

V.

GREG KLEYNERMAN,

DEFENDANT-APPELLANT-CROSS-RESPONDENT,

RED FLAG CARGO SECURITY SYSTEMS, LLC,

DEFENDANT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Milwaukee County: PEDRO COLON, Judge. *Affirmed*.

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. This case arises from a June 2009 transaction involving the sale of all valuable assets, including patents and related materials, owned by Alpha Cargo Technology, LLC to Red Flag Cargo Security Systems, LLC.[1] Greg Kleynerman and Scott Smith each own fifty percent of ACT. In December 2011, Smith initiated this action against Kleynerman and Red Flag, claiming, among other things, that: (1) Kleynerman breached his fiduciary duty owed to Smith with respect to the Red Flag transaction; and (2) Kleynerman intentionally made material misrepresentations to Smith that caused Smith to suffer pecuniary damages.[2]

¶2 A jury found against Kleynerman as to the breach of fiduciary duty claim and awarded Smith $499,000 in compensatory damages. The jury found in favor of Kleynerman as to the intentional misrepresentation claim, but the jury awarded Smith punitive damages in response to the related punitive damages question: "How much should Smith receive from Kleynerman as punitive damages for Kleynerman's intentional misrepresentation(s)?" The circuit court accepted the jury's verdict.

¶3 The parties filed cross post-verdict motions. The circuit court found that the jury's award of punitive damages was legally inconsistent with the jury's

[1] Red Flag Cargo Security Systems was formerly known as Alpha Cargo Technology Marketing. For ease of discussion, we will refer to Alpha Cargo Technology Marketing, the company that purchased the assets and subsequently changed its name to Red Flag Cargo Security Systems, as Red Flag in the remainder of this opinion. We will refer to Alpha Cargo Technology, the company owned by Smith and Kleynerman that sold the assets, as ACT.

[2] Smith's amended complaint alleged additional claims that were not tried to the jury and, therefore, those claims are not addressed in this opinion. A third claim—that Smith and ACT are entitled to rescind the transaction because, according to Smith, he was incompetent when he signed the transaction documents in June 2009—was tried to the jury, but the jury's verdict against Smith and ACT on the rescission claim is not contested on appeal.

verdict that the representations were *not* untrue and, therefore, struck the punitive damages award. The circuit court denied the parties' motions seeking to alter any other portion of the verdict.

¶4 Kleynerman appeals the order granting judgment as to the breach of fiduciary duty claim. Smith cross-appeals as to the intentional misrepresentation claim. For the reasons set forth below, we affirm.

BACKGROUND

¶5 We summarize the facts of this case here and relate additional pertinent facts in the discussion.

¶6 In 2002, Smith and Kleynerman formed Alpha Cargo Technology, LLC to distribute cargo security seals in the United States. Smith and Kleynerman each own fifty percent of ACT, which owned certain security technology patents before those patents were sold in June 2009 to Red Flag as part of an assets sale transaction.

¶7 Prior to June 2009, ACT had no employees aside from Kleynerman and Smith, no business office, and no manufacturing facility. Its business model then was to import cargo security seals, primarily from the Ukraine, and then to re-sell those seals to its customers. The drawbacks of this model included high import costs, long production lead times, and unsteady cash flows due to required pre-payment for orders.

¶8 ACT's gross revenue grew from $18,856 in 2003 to $680,187 in 2006 and $475,813 in 2007. In late 2007, ACT lost its biggest customer, and its gross revenue dropped to $56,428 in 2008. By September 2008, Kleynerman and

Smith recognized that their company was in financial trouble and that they needed to find a way to "fix" it.

¶9 In early 2008, Kleynerman became acquainted with Bruce Glaser, a "consultant for owners of businesses." Glaser subsequently entered into certain business dealings with Kleynerman and his wife, and loaned money to Kleynerman. In late 2008 and early 2009, Kleynerman and Glaser engaged in discussions relating to ACT and the business of cargo security seals, specifically to create new companies that would manufacture cargo security seals domestically and sell the manufactured seals.

¶10 Meanwhile, in January 2009, Smith wrote an email to Kleynerman to propose a new business model in an effort to save their business. Kleynerman forwarded that message to Glaser and told Glaser: "As you can see, he [Smith] really want[s] to do something. He know[s] nothing about our work with you. I guess I will have to talk with him soon." Soon after that email, Kleynerman told Smith that he had found investors and began to involve Smith in the discussions with Glaser and a second investor, Greg Grinberg.

¶11 In March 2009, Smith, Kleynerman, and Glaser signed a Memorandum of Understanding that described the terms of the potential transaction between Red Flag and ACT. According to the MOU, ACT would sell all valuable assets including its patents to Red Flag, which was owned by Glaser and Grinberg, for a nominal dollar. Glaser owned seventy-five percent of Red Flag and Grinberg owned the remaining twenty-five percent. ACT would then serve as Red Flag's sales representative for one year.

¶12 In June 2009, the parties signed an asset sale agreement, a sales representative agreement, and a bill of sale, which together contained the terms

described above. The asset sale agreement further indicated that Red Flag would pay ACT up to $70,000 for its assets depending on actual sales of the manufactured seals. But, if no seals were sold, then ACT would receive nothing for its assets beyond the nominal dollar. According to Kleynerman, there were no sales until 2012 after domestic production was ready.

¶13 In May 2010, Glaser terminated the sales representative agreement between Red Flag and ACT. Glaser asked Kleynerman to continue to work for Red Flag, but did not make a similar offer to Smith. Smith was left owning fifty percent interest in a company, ACT, with no valuable assets.

¶14 In February 2011, Glaser sold his seventy-five percent interest in Red Flag to Kleynerman for a nominal value. Kleynerman subsequently made changes to the cargo seal product, which improved cost and performance. Red Flag's gross revenue increased from $98,152 in 2011 to more than $1.5 million in 2012.

¶15 In December 2011, Smith filed this action against Kleynerman and Red Flag. Pertinent to this appeal, Smith claimed that Kleynerman breached his fiduciary duty owed to Smith as it related to Smith's interests in the June 2009 transaction with Red Flag, and that Kleynerman made various misrepresentations to Smith to induce him to agree to the transaction to his detriment.

¶16 At the end of a six-day jury trial, the jury was presented with a special verdict form containing nineteen questions. As to the breach of fiduciary duty claim, the jury found that Kleynerman owed a fiduciary duty to Smith and that Kleynerman breached that duty, causing Smith damages in the amount of $499,000.

¶17 As to the misrepresentation claim, the jury found that Kleynerman made certain representations to Smith but that those representations were not "untrue." The jury was also asked to answer the question of punitive damages if they found that Kleynerman had made misrepresentations and that those misrepresentations caused Smith to suffer damages. Although the jury did not make those findings, the jury nevertheless awarded Smith $200,000 in punitive damages.

¶18 The parties filed cross post-verdict motions. The circuit court found the jury's award of punitive damages was legally inconsistent with the jury's verdict that the representations were *not* untrue—in other words, that there were no misrepresentations—and, therefore, the circuit court struck the punitive damages award. The circuit court denied the parties' motions seeking to alter any other portion of the verdict.

DISCUSSION

¶19 In the sections that follow, we first address Kleynerman's appeal with respect to the breach of fiduciary duty claim. We then address Smith's cross-appeal as to the intentional misrepresentation claim.

A. Kleynerman's Appeal: Breach of Fiduciary Duty Claim

¶20 Kleynerman appeals the order granting judgment in favor of Smith, and denying his motion for judgment notwithstanding the verdict, as to the breach of fiduciary duty claim. To prove a claim for breach of fiduciary duty, Smith must show that: (1) Kleynerman owed Smith a fiduciary duty, (2) Kleynerman breached that duty, and (3) that breach caused Smith damage. *See* ***Groshek v. Trewin***, 2010 WI 51, ¶12, 325 Wis. 2d 250, 784 N.W.2d 163.

¶21 Kleynerman argues that the order granting judgment should be reversed for five reasons: (1) Kleynerman did not owe Smith a fiduciary duty; (2) Smith's claim is barred by the two-year statute of limitations because his claim accrued when the Red Flag transaction occurred in June 2009; (3) Kleynerman did not breach any fiduciary duty owed to Smith; (4) Smith presented no competent evidence of any damages caused by Kleynerman's alleged breach of fiduciary duty; and (5) Smith has no standing to recover damages that ACT allegedly sustained.

¶22 Kleynerman frames his arguments within the context of the circuit court's denial of his motion for judgment notwithstanding the verdict. As a general matter, "[w]e review a [circuit] court's denial of a motion for judgment notwithstanding the verdict de novo, applying the same standards as the [circuit] court." ***Hicks v. Nunnery***, 2002 WI App 87, ¶15, 253 Wis. 2d 721, 643 N.W.2d 809. "A motion for judgment notwithstanding the verdict accepts the findings of the verdict as true but contends that the moving party should have judgment for reasons evident in the record other than those decided by the jury." ***Id.*** "The motion does not challenge the sufficiency of the evidence to support the verdict, but rather whether the facts found are sufficient to permit recovery as a matter of law." ***Id.***

¶23 Despite the framework that Kleynerman asserts as being employed here, Kleynerman's third and fourth arguments appear to be challenges to the sufficiency of the evidence. "In reviewing the sufficiency of the evidence on appeal, we view the evidence in the light most favorable to the jury's verdict, and we sustain the jury's verdict if there is any credible evidence to support it." ***K&S Tool & Die Corp v. Perfection Machinery Sales, Inc.***, 2006 WI App 148, ¶46,

295 Wis. 2d 298, 720 N.W.2d 507. We address and reject Kleynerman's arguments in the sections that follow.

1. Existence of Fiduciary Duty

¶24 Kleynerman argues that, as a matter of law, he did not owe Smith a fiduciary duty to act in furtherance of Smith's interest as it related to the transaction with Red Flag. "The existence of a [fiduciary] duty is a question of law." ***McMorrow v. Specht***, 2012 WI App 124, ¶5, 344 Wis. 2d 696, 824 N.W.2d 907. Kleynerman makes several lengthy arguments on appeal as to why he did not have a fiduciary duty towards Smith, but he ignores an important fact that he had conceded at trial, which is that he is a corporate officer of ACT. Under the facts of this case, by virtue of his being a corporate officer of ACT, Kleynerman owed a fiduciary duty to Smith in conducting corporate business, which included the 2009 transaction with Red Flag.

¶25 "It is well established that a corporate officer or director is under a fiduciary duty of loyalty, good faith and fair dealing in the conduct of corporate business." ***Modern Materials, Inc. v. Advanced Tooling Specialists, Inc.***, 206 Wis. 2d 435, 442, 557 N.W.2d 835 (Ct. App. 1996). "Indeed, a corporate director owes a fiduciary duty to both the corporation and its shareholders." ***McMorrow***, 344 Wis. 2d 696, ¶8.

¶26 Here, the parties asked the circuit court to instruct the jury that Kleynerman "held an officer position with ACT" and that officers "occupy fiduciary positions and are held to strict rules of honesty and fair dealing between themselves and their employers." Kleynerman did not object to this instruction in the circuit court and does not now argue that the instruction was erroneous. Nor does Kleynerman dispute that the transaction with Red Flag constitutes "conduct

of corporate business." Thus, we reject Kleynerman's argument that he was entitled to a directed verdict based on the proposition that he did not owe Smith a fiduciary duty of loyalty, good faith, and fair dealing, in his capacity as an officer of ACT, as it related to the transaction with Red Flag.

2. Statute of Limitations

¶27 Kleynerman argues that Smith's breach of fiduciary duty claim is barred by the two-year statute of limitations because, according to Kleynerman, that claim accrued on June 5, 2009, when the parties signed the agreements that constitute the transaction with Red Flag, and Smith did not file this action until December 2011. Smith argues that this claim is not time-barred because he did not "discover" the breach of fiduciary duty until at the earliest May 2010, after Red Flag terminated its sales agreement with ACT, when Kleynerman "revealed the truth to Smith in a phone call informing him that he was fired."

¶28 "It is well settled that a cause of action accrues when there exists a claim capable of enforcement, a suitable party against whom it may be enforced, and a party with a present right to enforce it." ***Pritzlaff v. Archdiocese of Milwaukee***, 194 Wis. 2d 302, 315, 533 N.W.2d 780 (1995). "A party has a present right to enforce a claim when the plaintiff has suffered actual damage, defined as harm that has already occurred or is reasonably certain to occur in the future." ***Id.*** "The discovery rule does not change these basic propositions, it simply defines some of the elements." ***Id.*** "That is, the discovery rule is so named because it tolls the statute of limitations until the plaintiff discovers or with reasonable diligence should have discovered that he or she has suffered actual damage due to wrongs committed by a particular, identified person." ***Id.***

¶29 Here, contrary to Kleynerman's characterization, Smith's claim is not that the transaction made him vulnerable to being fired after a year, but rather, that Kleynerman collaborated with Glaser to engineer a transaction that would ultimately give Kleynerman control over Red Flag and the ACT assets that had been transferred to Red Flag. Smith's theory is that this collaboration cut Smith off from the income related to those assets, and that Smith did not discover this breach until after Smith's relationship with Red Flag through ACT was terminated. Upon our review of the record, we conclude that Smith could not have reasonably discovered that Kleynerman was, according to Smith, "planning to take over Red Flag" and "had been working for Red Flag's benefit behind Smith's back," until at the earliest May 2010, when the sales agreement with ACT was terminated and Kleynerman remained employed by Red Flag. Indeed, it may be that Smith did not discover Kleynerman's injurious actions until February 2011, when Kleynerman purchased Glaser's equity interest in Red Flag for a nominal value. Thus, we conclude that Smith's breach of fiduciary duty claim is not barred by the statute of limitations.

3. Breach of Fiduciary Duty

¶30 Kleynerman argues that "the undisputed facts at trial show that, as a matter of law, Kleynerman did not breach a fiduciary duty to Smith."

¶31 The breach of a fiduciary duty requires "disloyalty or infidelity." ***Zastrow v. Journal Commc'ns, Inc.***, 2006 WI 72, ¶30, 291 Wis. 2d 426, 718 N.W.2d 51. "Whether a duty has been breached is a mixed question of law and fact." ***McMorrow***, 344 Wis. 2d 696, ¶5. "We will not overturn the circuit court's determination of the facts unless it is clearly erroneous." ***Id.*** "Whether the facts constitute a breach is a question of law." ***Id.*** In reviewing the jury's verdict, "we

must search the record for credible evidence in support of the verdict, accepting any reasonable inferences favorable to the verdict that the jury could have drawn from that evidence." ***Staehler v. Beuthin***, 206 Wis. 2d 610, 617, 557 N.W.2d 487 (Ct. App. 1996). As we now explain, the evidence presented and viewed in the most favorable light to the verdict for Smith does demonstrate a breach of fiduciary duty.

¶32 Upon our review of the record, we conclude that the evidence at trial can reasonably support the inference that Kleynerman and Glaser coordinated acts relating to the June 2009 Red Flag transaction that were adverse to Smith's interest, that the acts were unknown to Smith, and that those acts constituted disloyalty and unfair dealing on the part of Kleynerman as to Smith. For example, Glaser testified that four days before the transaction documents were signed, Glaser copied Kleynerman on an email that read: "FYI, [Smith] hasn't signed the agreements yet and hasn't contacted me in several days even though the ball is in his court. *If he asks you anything about the relationship between our new company and him, plead ignorance.*" (Emphasis added). It does not appear that Kleynerman ever told Smith about this email.

¶33 As another example, Glaser testified that in April 2009, prior to the transaction occurring, Glaser opened checking accounts for Red Flag and gave "signature authority" only to himself and Kleynerman. Thus, as early as April 2009, Kleynerman was already exerting control over Red Flag despite the fact that he did not legally have an equity interest in Red Flag until February 2011. Glaser also testified that he structured his investments in Red Flag in the form of loans secured by Red Flag's assets. Therefore, when Glaser sold his seventy-five percent interest in Red Flag to Kleynerman in February 2011, the purchase price was a nominal value with the expectation that Glaser would later recoup his full

investment plus interest in the form of loan payments from Red Flag. In other words, there was evidence that Kleynerman and Glaser coordinated the structure of the transaction in a manner that resulted in Kleynerman becoming the majority owner of, in effect, an improved and better version of the former ACT, thanks to a loan from Glaser to establish domestic production capabilities and Kleynerman's devotion of all of his time. On the other hand, the transaction left Smith with fifty percent ownership of a company that had sold off all of its valuable assets for a single dollar.

¶34 It is reasonable for the jury to infer from the above evidence, and additional evidence in the record, that Kleynerman committed acts of disloyalty and unfair dealing towards Smith with respect to the transaction with Red Flag. Therefore, we conclude that those facts demonstrate that Kleynerman breached his fiduciary duty owed to Smith.

4. Evidence of Damages

¶35 Kleynerman makes a series of arguments that amount to a challenge to the jury's damage award. "[W]hether the breach [of fiduciary duty] caused the plaintiff's damages is a question of fact." ***McMorrow***, 344 Wis. 2d 696, ¶5. "[W]e will sustain a jury's damage award as long as it is supported by credible evidence." ***Tony Spychalla Farms, Inc. v. Hopkins Agr. Chemical Co.***, 151 Wis. 2d 431, 442, 444 N.W.2d 743 (Ct. App. 1989). "To support a damage award, the evidence must demonstrate that a party was injured in some way and establish sufficient data from which the jury could properly estimate the amount of damages." ***Id.***

¶36 Here, Kleynerman's breach of fiduciary duty caused Smith: (1) to be the owner of a company, ACT, which no longer owned patents and related

assets, but had instead become a mere sales representative that was ultimately terminated by Red Flag; and (2) to lose all ownership of ACT's patents and products, which are now owned by Red Flag and Kleynerman as the majority owner of Red Flag. Because of this breach, Smith lost his interest in the profits generated from the patents and products, in the form of the profits from the cargo seal sales. The credible evidence presented at trial demonstrates that a reasonable estimate of Smith's damages as a result of this breach is his fifty percent interest in ACT's profits had the patents and improvements made by Kleynerman to the cargo seals remained with ACT, and had the seals been sold by ACT instead of Red Flag.

¶37 To establish this value, Smith presented testimony from Paul Rodrigues, a certified public accountant and certified fraud examiner. Rodrigues testified that he reviewed Smith's and Kleynerman's depositions, along with discovery documents including Red Flag's profit and loss statements and tax returns. Based upon his review and calculations, Rodrigues determined to a reasonable certainty that had Red Flag's sales been made by ACT, then, applying ACT's previous profit margin, ACT would have had profits of between $898,000 and $978,000. Thus, Smith's fifty percent interest in ACT would have yielded between $449,000 and $489,000 in profits.

¶38 Kleynerman presented testimony by Gregory Ksicinski, a certified public accountant, to dispute Rodrigues's methodology and calculations.[3] However, the jury was entitled to reject Ksicinski's opinions and, for that matter, Ksicinski did not opine as to what would be the proper methodology and calculation with respect to profits.

¶39 In sum, we conclude that there is credible evidence supporting the damages award.

5. Standing to Recover Damages

¶40 Kleynerman argues that Smith does not have standing to recover lost profits in a direct action against Kleynerman because those damages belong to ACT rather than its members. We disagree and conclude that Smith has shown an injury that is personal to him, rather than an injury primarily to ACT, and therefore, Smith has standing to recover damages for his breach of fiduciary duty claim.

¶41 "'Standing' is a concept that restricts access to judicial remedy to those who have suffered some injury because of something that someone else has either done or not done." ***Krier v. Vilione***, 2009 WI 45, ¶20, 317 Wis. 2d 288, 766 N.W.2d 517 (quoted source omitted). "The law of standing should be liberally construed, and as such, standing is satisfied when a party has a personal stake in

[3] Kleynerman also challenges Rodrigues's methodology and calculations as part of his argument, both at trial and on appeal, that the circuit court erroneously did not exclude Rodrigues's testimony for failing to meet the ***Daubert*** standard set forth in WIS. STAT. § 907.02 (2013-14). However, we agree with the circuit court that Kleynerman's challenges go to the weight, not the admissibility, of Rodrigues's testimony, and that Kleynerman had ample opportunity to test Rodrigues's testimony through cross-examination and his own expert's testimony.

the outcome." ***Id.*** As noted above, a "corporate officer or director is under a fiduciary duty to act in good faith and to deal fairly in the conduct of all corporate business." ***Reget v. Paige***, 2001 WI App 73, ¶12, 242 Wis. 2d 278, 626 N.W.2d 302. "This duty extends to the corporation, itself, and to its shareholders." ***Id.*** "[T]o bring individual claims for breach of a fiduciary duty, [the plaintiff's complaint] must allege facts sufficient, if proved, to show an injury that is personal to him, rather than an injury primarily to the corporation." ***Id.*** "An injury due to a director's action is primarily an injury to an individual shareholder if it affects a shareholder's rights in a manner distinct from the effect upon other shareholders." ***Jorgensen v. Water Works, Inc.***, 2001 WI App 135, ¶16, 246 Wis. 2d 614, 630 N.W.2d 230; *see also* ***Notz v. Everett Smith Group, Ltd.***, 2009 WI 30, ¶23, 316 Wis. 2d 640, 764 N.W.2d 904.

¶42 Here, Kleynerman's breach of fiduciary duty with respect to the transaction with Red Flag affected Kleynerman and Smith, who each own an equal fifty percent of ACT, differently. While Kleynerman now has a majority interest in what used to be ACT's patents and, thus, receives profits generated from those patents, Smith is left with only his fifty percent interest in ACT, which is essentially a defunct sales company now that it has been terminated by Red Flag. It is evident that the injury from Kleynerman's breach of fiduciary duty affected Smith's rights to the profits generated by the cargo seal patents in a manner distinct from the effect upon Kleynerman's rights, and therefore, Smith has standing to recover damages for the breach of fiduciary duty claim.

B. Smith's Cross Appeal

¶43 Smith's cross-appeal concerns his claim that Kleynerman intentionally made certain misrepresentations to induce him to agree to the Red

Flag transaction to his detriment. Smith argues that the jury's special verdict answer that there were no "untrue" representations should be changed, or in the alternative, that Smith should be granted a new trial on his intentional misrepresentation claim. We address and reject Smith's arguments in the sections that follow.

1. Credible Evidence Supporting Special Verdict Answer That Representations Were Not "Untrue"

¶44 "On appeal, we examine jury verdicts to determine whether the record contains 'any credible evidence' that under any reasonable view supports the verdict." ***D'Huyvetter v. A.O. Smith Harvestore Prods.***, 164 Wis. 2d 306, 320, 475 N.W.2d 587 (Ct. App. 1991) (quoted source omitted). "Where, as here, the verdict has the [circuit] court's approval, our scope of review is even more limited." ***Id.*** "We search for credible evidence to sustain the jury's verdict, not for evidence to sustain a verdict the jury could have reached but did not." ***Id.***

¶45 Here, the special verdict form asked the jury in Question 4 to place a check mark next to the representations relating to the Red Flag transaction that the jury found Kleynerman made to Smith prior to the execution of the agreements. The jury found that Kleynerman made the following three representations:

- "Glaser and Grinberg would invest at least $250,000 in ACT,"
- "Kleynerman and Smith would own 49% of ACT after the sale," and
- "Grinberg and Glaser needed Smith to remain on at ACT after the Transaction because Grinberg and Glaser knew nothing about the security industry."

The special verdict form then asked the jury in Question 5: "Were any of the marked representations untrue?" The jury answered, "No." In other words, the

jury found that Kleynerman made certain representations to Smith, but that those representations were *not* misrepresentations at the time that they were made.

¶46 Smith argues that the circuit court erred in denying his motion to change the jury's answer in special verdict Question 5 to "Yes" because, according to Smith, there is no credible evidence to support the jury's verdict that the representations made were not untrue. More specifically, Smith argues, "Once the jury made the finding that those three representations were made, the only conclusion supported by the evidence at trial was that the representations were untrue. The dispute at trial centered on whether or not the representations were made—not whether they were true." To the extent that Smith may be challenging the contents of special verdict Question 5, we note that Smith did not object to the special verdict questions and, therefore, waived his right to object to them. *See* ***Estate of Hegarty v. Beauchaine***, 2006 WI App 248, ¶54, 297 Wis. 2d 70, 727 N.W.2d 857 ("A failure to object at the jury instruction or verdict conference stage 'constitutes a waiver of any error in the proposed instructions or verdict.'" (quoted sources omitted)). Upon our review of the record, we conclude that there is credible evidence supporting the jury's verdict that the representations were not untrue at the time they were made.

¶47 First, it can be reasonably inferred from the evidence that Glaser and Grinberg intended to invest at least $250,000 into developing the manufacturing and production capabilities that would benefit ACT. Indeed, Glaser testified that he personally invested over $200,000. Therefore, it was reasonable for the jury to infer that Kleynerman's representation that "Glaser and Grinberg would invest at least $250,000 in ACT" was not untrue.

¶48 Second, it is undisputed that Kleynerman and Smith remained the only owners of interests in ACT after the transaction occurred, each with fifty-percent ownership. Thus, it was reasonable for the jury to infer that Kleynerman's representation that "Kleynerman and Smith would own 49% of ACT after the sale" was not untrue because they own at least that much, in that they together own all of ACT.

¶49 Third, it is undisputed that Glaser and Grinberg were not familiar with the security industry. Indeed, Kleynerman testified that Glaser and Grinberg knew nothing about seal technology. Glaser testified that Kleynerman and Smith had the knowledge and sales contacts. Thus, it was reasonable for the jury to infer that Kleynerman believed that Glaser and Grinberg needed Smith "to remain on at ACT" for at least some time after the Red Flag transaction because those men knew nothing about the security industry, whereas Smith had industry knowledge and contacts. Therefore, it can be reasonably inferred that Kleynerman's representation as to that need was not untrue.

¶50 In sum, we conclude that credible evidence supports the jury's answer to Question 5 rejecting Smith's intentional misrepresentation claim, and that the circuit court did not err in denying Smith's motion to change that answer.

2. New Trial on the Basis of Inconsistent Verdict Due to Jury Confusion

¶51 In the alternative, Smith argues that he is entitled to a new trial on his intentional misrepresentation claim "because the jury verdict is inconsistent and the result of jury confusion." Smith bases this argument on the jury's rejection of his intentional misrepresentation claim in Question 5 of the special

verdict, and the jury's award of punitive damages for intentional misrepresentation in its answers to Questions 13 and 14.[4]

¶52 "An inconsistent verdict is one in which the jury's answers are 'logically repugnant to one another.'" ***Kain v. Bluemound East Indus. Park, Inc.***, 2001 WI App 230, ¶40, 248 Wis. 2d 172, 635 N.W.2d 640 (quoted source omitted). "Inconsistency exists when answers cannot be reconciled or cannot be reconciled without eliminating or altering an answer. We uphold a jury verdict on review for inconsistency 'when the record is such that the jury could have made both of the findings that are claimed to be inconsistent.'" ***Reuben v. Koppen***, 2010 WI App 63, ¶13, 324 Wis. 2d 758, 784 N.W.2d 703 (quoted source omitted). However, "[f]ailing to follow the court's instructions may create only superfluous information, not a logical contradiction." ***Frey v. Alldata Corp.***, 895 F. Supp. 221, 224 (E.D. Wis. 1995).

¶53 Here, the jury found in Question 5 that Kleynerman's representations to Smith were not untrue and, therefore, the jury did not answer Questions 6 through 9 regarding the intentional misrepresentation claim and compensatory damages. Yet, the jury answered Question 13, which asked the jury, "If any amount of money was written as an answer to Question 9 above, did Kleynerman act maliciously toward Mr. Smith, or in an intentional disregard for the rights of Smith by intentionally misrepresenting material facts to Smith?" The jury answered, "Yes." Question 14 then asked, "How much should Smith receive

[4] We do not understand Smith to argue that the verdict questions themselves were problematic, and we reiterate that in any case Smith did not object to the special verdict questions before the verdict was submitted to the jury, and therefore, he waived his right to object to the contents of the special verdict. *See* ***Estate of Hegarty v. Beauchaine***, 2006 WI App 248, ¶54, 297 Wis. 2d 70, 727 N.W.2d 857.

from Kleynerman as punitive damages for Kleynerman's intentional misrepresentation(s)?" The jury answered, "$200,000."

¶54 Like the jury in ***Frey***, 895 F. Supp. 221, this jury did not follow the court's instructions by answering Questions 13 and 14 regarding punitive damages after it had found that none of Kleynerman's representations from Question 4 were "untrue." Because the analysis should have stopped once the jury found that none of the representations in Question 4 were untrue, the answers to Questions 13 and 14 were superfluous. *See* ***id.*** at 224 (citing a Ninth Circuit case which affirmed a lower court's rejection of a jury answer on the amount of damages when the jury found no damages and, yet, answered the next question finding $7,500 in damages); *see also* ***Mackenzie v. Miller Brewing Co.***, 2000 WI App 48, ¶85, 234 Wis. 2d 1, 608 N.W.2d 331 (holding that the jury's punitive damages was "legally superfluous" but not "logically inconsistent" because the jury "reasonably could have returned verdicts finding that [defendant's] conduct justified a punitive award, but that [defendant] did not cause [plaintiff] any compensatory damages."). Here, the answers as to punitive damages were superfluous, in that they were legally impossible, not logically inconsistent. *See* ***Frey***, 895 F. Supp. at 224.

¶55 Also as in ***Frey***, although the jury in this case disregarded the court's plain instruction, we discern no evidence of confusion. The circuit court sent the special verdict back to the jury, not once but twice, and ordered the jury to "look carefully at all of the questions." It does not appear from the record that the jury ever asked the court any clarifying questions. In sum, we conclude that Smith is not entitled to a new trial as to his intentional misrepresentation claim.

CONCLUSION

¶56 For the reasons set forth above, we conclude that the circuit court did not err in denying Kleynerman's motion for judgment notwithstanding the verdict as to Smith's breach of fiduciary duty claim. We further conclude that the circuit court did not err in denying Smith's motion to change the jury verdict, and that Smith is not entitled to a new trial as to his intentional misrepresentation claim.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).